IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.12.2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE K.K. SASIDHARAN

Writ Appeal No.4198 OF 2005

A. Amaresan ..Appellant

Vs.

1. The Tamil Nadu Industrial Investment Corporation Limited rep. By its Branch Manager, Thiruvallur District Branch Ambattur Industrial Estate Chennai-58.

2. N. Venkatesan
R.2 impleaded as party respondent vide order dt.25.1.2007 made in WAMP.No.8 of 2007 .. Respondents

Writ appeal against the order dated 3.11.2004 in W.P.No.14111 of 2004 of the learned Single Judge, this writ petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records relating to the proceedings of the respondent to accept payment as per letter dated 17.02.2004.

For Appellant : Mr.M. Devaraj
For Respondents : Mr.A.Panneerchelvam for R.1
Mrs.Usha Ramman for R.2

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J U D G E M E N T

K.K.SASIDHARAN, J

The unsuccessful petitioner in W.P.No.14111 of 2004 is the appellant in this writ appeal.

2. The factual matrix of the case necessary for the disposal of the writ appeal is as follows.

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One Arunachala Nadar borrowed a sum of Rs.9.90 lakh in the year 1989 for the purpose of construction of a lodging house in Gummidipoondi Village, Thiruvallur District in the State of Tamilnadu.

3. A term loan was sanctioned by the first respondent on 04-04-1999 and the borrower availed the loan to an extent of Rs.8,39,255.30. The lodging house constructed in the property was given as collateral security for due discharge of the loan amount. While so, Arunachala Nadar died in the year 2002. Since the loan amount was not paid in time and as there was an arrears to the tune of Rs.13,07,846/- the first respondent resorted to recovery proceedings and brought the property for sale. Challenging the said order the appellant preferred W.P.No.35771 of 2003 before this court and the said writ petition was disposed as per order dated 08.12.2003 and the operative portion of the order is extracted below.

> "Confirmation of the auction held today in favour of the highest bidder would stand deferred on condition that the petitioner deposits a sum of Rs.50,000/= on or before 31.12.2003 with the respondent and the balance sum of Rs.12,50,000/= shall be paid either as one time payment or in instalments on or before 28.2.2004. Failing compliance of the conditions referred to above would result in the order granting instalment payment today standing revoked with liberty to the respondent to proceed with the legal consequences of the auction held today and in that course this order will not come in the way of the respondents. This court is informed that the petitioner had already given a representation dated 22.10.2003 to the respondent offering an one time settlement and such a request is will within the time namely, 31.12.2003. Therefore, the respondent is directed to consider that representation, in accordance with law and pass orders thereon in any event not later than 10.1.2004. If there is an order in favour of the writ petitioner, on that representation, then the petitioner would not be entitled to the benefits of the instalment payment granted today and instead he has to adhere to the terms and conditions of the acceptance, if any, on the one time settlement offer made by the petitioner."

4. The appellant subsequently approached the first respondent for one time settlement and waiver of interest in respect of the loan and the first respondent as per proceedings dated 17.02.2004 called upon the petitioner to pay a sum of Rs.9,12,719.30 as onetime settlement to be payable on or before 29.02.2004. The appellant failed to avail the onetime settlement, which resulted in taking further action by the first respondent for sale of the collateral security. The property was sold subsequently and the excess amount received by way of sale proceeds after adjusting the loan amount viz., Rs. 30,206.70 was given to the appellant by way of a cheque and the said payment was made on 04.05.2004.

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5. The appellant on receipt of the communication dated 04.05.2004 along with the cheque for a sum of Rs. 30,206.70 challenged the said proceedings before this court in W.P.No.14111 of 2004 contending that the value of the property is about Rs.65.15 lakh even according to the first respondent and as such the property was sold for a paltry sum and accordingly the appellant prayed for setting aside the impunged proceedings and for a direction to the first respondent to accept the payment as indicated in the letter dated 17.02.2004 of the appellant addressed to the first respondent.

6. During the pendency of the writ petition the successful bidder filed an application to implead himself as a party to the proceedings and accordingly he was impleaded as second respondent.

7. When W.P.No.14111 of 2004 came up before the learned Single Judge for vacating the interim order granted earlier, the learned counsel for the appellant undertook to pay the entire amount of the sale proceeds, which the property secured in the auction along with an amount of Rs.1 lakh and accordingly recording the said undertaking the matter was adjourned to 18.10.2004. Subsequently the matter was taken up on 18.10.2004 and as it was found that the appellant had not deposited the amount as undertaken by him, the learned Single Judge directed him to bring a demand draft for a sum of Rs. 17.50 lakhs on 26.10.2004 and further observed that in the event of default, the writ petition would be summarily rejected without any further hearing.

8. The writ petition was taken up for final hearing on 3.11.2004 and when it was found that the earlier order dated 18.10.2004 has not been complied with, the learned Judge found that the order had already worked out itself and there is nothing to be decided in the writ petition and accordingly disposed the writ petition with the said observation. It is the said order dated 3.11.2007 in W.P.No.14111 of 2007 which is impugned in this writ appeal.

9. In this factual background, we have heard Mr.M. Devaraj, learned counsel for the appellant; Mr. A. Panneerchelvam, learned counsel for respondent No.1 and Mrs.Usha Ramman, learned counsel for the second respondent.

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10. The main contention of the learned counsel for the appellant relates to the sale of the property for a lesser amount than the actual market price, which it would have fetched, in case the sale was done in a more transparent manner. By relying on the judgment reported in 2004(7) S.C.C. 166 (S.J.S. BUSINESS ENTERPRISES (P) LTD. v. STATE OF BIHAR), the learned counsel submitted that the first respondent is expected to secure the best price for the property and failure of the same vitiates the very sale made by the first respondent.

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11. The learned counsel for the first respondent Corporation submitted that the auction was conducted in an open and transparent manner with due publicity and in the said auction, the highest bid was for a sum of Rs.14 lakhs and the said offer by the second respondent was accepted. The first respondent further contended that in spite of giving adequate opportunity to the appellant to pay the amount, he did not avail the said opportunity and as such there is no illegality in the order of learned Single Judge, which needs interference in this writ appeal.

12. The learned counsel for the auction purchaser vehemently contended that the auction was conducted as early as in the year 2003 and the second respondent took part in the auction and his bid for an amount of Rs.14 lakhs was confirmed and as per the terms and conditions of auction, the second respondent has also deposited the said amount of Rs.14 lakhs before the first respondent. Because of the pendency of litigation, the second respondent was not able to get physical possession of the property, though auction was confirmed in his name.

13. There is no dispute with regard to the availing of loan by the father of the appellant and the subsequent proceedings initiated by the first respondent for recovery of the arrears and the legal proceedings initiated by the appellant to avoid the auction and the orders passed by this court on three occasions for the purpose of enabling the appellant to discharge the loan amount and save the property from auction. In the initial stage itself, this court as per order dated 8.12.2003 in W.P.No.35771 of 2003 permitted the appellant to pay a sum of Rs.50,000/- on or before 31.12.2003 and the balance sum of Rs.12,50,000/- was directed to be paid on or before 28.2.2004. It was clearly indicated in the said order that failing compliance of the conditions, would result in the order granting instalment payment automatically revoked, which would give liberty to the first respondent to proceed with the auction proceedings. When it was found that the appellant has already given a representation to the first respondent on 22.10.20003 for the purpose of payment of the amount by way of one time settlement, the court directed the first respondent Corporation to dispose of the said representation on or before 10.1.2004. It is a matter of record that the first respondent duly considered the request made by the appellant for one time settlement and as per proceedings dated 17.2.2004, the appellant was directed to pay a sum of Rs.9,12,719.30 and the said offer was also not taken seriously by the appellant and in such circumstances, there was no other way for the first respondent than to continue with the auction proceedings for the sale of the property given as collateral security for the amount in question.

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14. The first respondent published the auction notice in "Daily Thanthi" and in the auction concluded thereafter, the bid given by the second respondent was found to be the highest one for a sum of Rs.14 lakhs and accordingly the bid was confirmed in favour of the second respondent in November, 2003.

15. When the appellant filed W.P.No.14111 of 2004 challenging the proceedings dated 4.5.2004, in and by which the first respondent forwarded the cheque for a sum of Rs.30,206.70 being the excess sale proceeds, the learned Single Judge passed an order recording the undertaking of the appellant whereby he had agreed to pay the entire amount of sale proceeds along with a sum of Rs.1 lakh and the said undertaking was also flouted by the appellant. Subsequently the learned Single Judge again passed a discretionary order on 18.10.2004 directing the appellant to bring a demand draft for a sum of Rs.17,50,000/- on 26.10.2004 and in the event of default, it was ordered that the writ petition would summarily be rejected without any further hearing. The appellant very conveniently ignored the said order also and ultimately when the matter came up for final hearing, the learned Single Judge having found that the earlier order dated 18.10.2004 had already worked itself out, disposed the writ petition with the said observation, as according to the learned Judge nothing survives in the writ petition on account of the conditional order passed on 18.10.2004.

16. The order dated 18.10.2004 is a discretionary order passed by the learned Single Judge permitting the appellant to produce a demand draft for a sum of Rs.17,50,000/- with a condition that in case the amount is not deposited, the writ petition would be dismissed without any further hearing. Subsequently when it was found that the appellant had not complied with the conditional order and as the order had worked out itself, the learned Single Judge disposed the very writ petition. The order dated 18.10.2004 has become final as the appellant did not challenge the said order in a manner known to law. The jurisdiction under Article 226 of the Constitution of India is a discretionary jurisdiction, which is also often called as equity jurisdiction. The learned Judge in spite of the fact that the property was sold way back in 2003, permitted the appellant to make a deposit of the auction amount with a view to pass appropriate orders to safeguard the interest of both the appellant as well as the Corporation and also the successful bidder. The appellant failed to make use of the said opportunity and therefore the appellant cannot be heard to say that he has been prejudicially affected on account of the sale of the property. In view of the discretionary nature of the order passed by the learned Judge on 18.10.2004 we do not find any scope for interference in a proceedings under Article 226 of the Constitution of India.

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17. It is trite law that the Court exercising jurisdiction under Article 226 of the Constitution of India is not an appellate authority in the matter of financial dealings of the Corporations. Judicial review is very limited in such cases and unless the order is found to be arbitrary, unreasonable irrational or shocking the conscience of the court in the fact situation, there cannot be any inference for substituting the decision.

18. Therefore we do not find any reason, much less justifiable reason to interfere with the proceedings of the first respondent in auctioning the property in favour of the second respondent, in as much as sufficient opportunity was given to the appellant to pay the amount. No document is produced by the appellant to show that before fixing the upset price due notice has to be issued to the borrower with respect to the sale of the property. In view of the fact that this court has shown indulgence to the appellant on three occasions to discharge the loan amount and as the appellant has not availed the said opportunity we do not find any reason to interfere with the order of the learned Single Judge.

19. The learned counsel for the appellant relied on the judgments of the Apex Court reported in 2004(7) S.C.C. 166 (S.J.S. BUSINESS ENTERPRISES (P) LTD. v. STATE OF BIHAR) and 2004(7) S.C.C.151 (GAJRAJ JAIN v. STATE OF BIHAR) and contended that the power vested in the Financial Corporations must be exercised bonafide and fairly and that in matters of sale, the Financial Corporations must act in accordance with the Statute and must not act unfairly and unreasonably. There is no quarrel with regard to the legal preposition that the Financial Corporations should show utmost good faith and bonafides in the matter of conduct of sale of the property given as collateral security.

20. In the decision in S.J.S. BUSINESS ENTERPRISES (P) LTD. v. STATE OF BIHAR, the Apex Court was considering the sale made by Bihar State Industrial Credit and Investment Corporation Limited and the observation contained in the said judgment was on account of unusual haste shown by the Corporation to sell the property and the Supreme Court also found that the Financial Corporation deviated from the norms in respect of the sale and shown unusual haste in the matter and set aside the sale. Similarly in the decision in GAJRAJ JAIN v. STATE OF BIHAR and others (2004(7) SCC 151), the Apex Court considered the issue with regard to the sale of the property of Bihar State Industrial Credit and Investment Corporation Limited and in the said case also there were serious irregularities in the sale, which made the Apex Court to comment about the auction sale. In the said matter, there were different items of property and after putting the assets to sale by public auction, the Corporation entered into an agreement of sale of the assets with the fourth respondent, without ascertaining the market value and realising the sale proceeds for distribution. In the said context, the Supreme Court observed that the mortgaged assets of the company could have been sold on itemised basis or

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as a whole, whichever is found on valuation to be more profitable. The Supreme Court in the facts of the said case found that the Corporation has misused the authority and power in breach of Law by taking into extraneous matters and by ignoring relevant matters which has rendered all its acts ultravires. The observations were made in the said factual context and ultimately the agreement of sale entered into by the Corporation to sell the property by private negotiation was set aside.

21. So far as the present case is concerned, it is on record that the first respondent has published the sale notification in "Thina Thanthi" and only after receiving the bids from various tenderers, the auction was confirmed in favour of the second respondent. Even after issuing the sale notification the first respondent permitted the appellant to pay the entire amount by way of one time settlement and the said offer has not been made use of by the appellant. Subsequently, the learned Single Judge as a condition for postponing the auction, permitted the appellant to pay the amount in two instalments, the substantial second instalment being payable after a period of one year. The appellant also failed to make use of the equitable order granted by the learned Single Judge. After the sale was conducted and the bid was confirmed in the name of the second respondent, again on two occasions, the learned Single Judge permitted the appellant to deposit the amount. However the appellant failed to comply with those orders also. In such circumstances, the judgment relied on by the learned counsel for the appellant would not come to his rescue inasmuch as the facts in those cases are entirely different.

22. Public Financial Institutions are dealing with public funds and unless the dealer repays the loan amount as per schedule it will not be possible for the institution to discharge their functions and to assist new entrepreneurs in opening their venture by granting necessary financial assistance. It is needless to say that the financial Corporations also on their part must act fairly.

23. The Apex Court in the case of HARIYANA FINANCIAL CORPORATION v. JAGADAMBA OIL MILLS (2002(3) SCC 496) considered the issue regarding the scope of interference in the functioning of Public Financial Corporations and held thus:-

> "6. The Corporation as an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public-oriented. It can operate effectively if there is regular realization of the instalments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the instalments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time-frame, it will disturb the equilibrium of the financial arrangements of the Corporations.

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They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the instalment by a defaulter may stand in the way of a deserving borrower getting financial assistance.

7. As was observed by this Court in Gem Cap case 2 the legislative intent in enacting the statute in question was to promote industrialization of the States by encouraging small and medium industries by giving financial assistance in the shape of loans and advances, repayable within a stipulated period. Though the Corporation is not like an ordinary moneylender or a bank which lends money, there is purpose in its lending i.e. to promote small and medium industries. The relationship between the Corporation and the borrower is that of a creditor and debtor. That basic feature cannot be lost sight of. A Corporation is not supposed to give loan and then to write it off as a bad debt and ultimately to go out of business. As noted above, it has to recover the amounts due so that fresh loans can be given. In that way industrialization, which is the intended object, can be promoted. It certainly is not and cannot be called upon to pump in more money to revive and resurrect each and every sick industrial unit irrespective of the cost involved. That would be throwing good money after bad money. As was rightly observed in Gem Cap case 2 promoting industrialization does not serve public interest if it is at the cost of public funds. It may amount to transferring public money to private account. In Mahesh Chandra case 1 this Court issued directions which were required to be observed by Financial Corporation while exercising power under Section 29. In this regard, it was observed at pp. 297-98 as follows: (SCC para 22)

> "Every endeavour should be made, to make the unit viable and be put in working condition. If it becomes unworkable:
>
> (1) Sale of a unit should always be made by public auction.
>
> (2) Valuation of a unit for purposes of determining adequacy of offer or for determining if bid offered was adequate, should always be intimated to the unit-holder to enable him to file objection if any as he is vitally interested in getting the maximum price.
>
> (3) If tenders are invited then the highest price on which tender is to be accepted must be intimated to the unit-holder.
>
> (4)(a) If unit-holder is willing to offer the sale price, as the tenderer, then he should be offered same facility and unit should be transferred to him. And the arrears remaining thereafter should be rescheduled to be recovered in instalments with interest after the payment of last instalment fixed under the agreement entered into as a result of tendered amount.

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(b) If he brings third parties with higher offer it would be tested and may be accepted.

(5) Sale by private negotiation should be permitted only in very large concerns where investments run in very huge amount for which ordinary buyer may not be available or the industry itself may be of such nature that by (sic many) normal buyers may not be available. But before taking such steps there should be advertisements not only in daily newspapers but business magazines and papers.

(6) Request of the unit-holder to release any part of the property on which the concern is not standing of which he is the owner should normally be granted on condition that sale proceeds shall be deposited in loan account."

8. The guidelines were stated to be necessary to ensure fair play. That decision, as the factual position would go to show, was rendered in a case where the borrower intended to repay the debt and was anxious to do so. While not insisting upon the borrower to honour the commitments undertaken by him, the Corporation alone cannot be shackled hand and foot in the name of fairness.

9. In matters like the present one, fairness cannot be a one-way street. Corporations borrow money from the Government or other Financial Corporations and are required to pay interest thereon. Where the borrower has no genuine intention to repay and adopts pretexts and ploys to avoid payment, he cannot make the grievance that the Corporation was not acting fairly, even if requisite procedures have been followed."

24. The Apex Court considered the extent of judicial review in the case of administrative action in Jagdamba Oil Mills case cited supra and held as follows:-

10. The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in A.K. Kraipak v. Union of India 3 . Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an Appellate Authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities; they have a certain

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amount of discretion available to them. They have "a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred" (as per Lord Diplock in Secy. of State for Education and Science v. Metropolitan Borough Council of Tameside, All ER at p. 695 f). The court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the court intervene. To quote the classic passage from the judgment of Lord Greene, M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. 5 : (All ER pp. 682H-683A)

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.".

25. We have considered the entire matter in the light of the factual matrix and with reference to the principles laid down by the Supreme Court and we do not find any reason to interfere with the discretionary order which is impugned in the writ appeal. Accordingly, the writ appeal is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Tamil Nadu Industrial Investment
Corporation Limited rep. By its Branch
Manager, Thiruvallur District Branch
Ambattur Industrial Estate
Chennai-58.

1 cc To Mr.G.R.Swaminathan, Advocate, SR.75417.
1 cc To Mr.A.Pannerselvam, Advocate, SR.75334.
1 cc To Mr.M.Devaraj, Advocate, SR.75068.

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